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FILED
OCT 2 2009
RORY L. PERRY, II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

JILL WILLEY, individually,
And MIKE WILLEY

Plaintiffs,

v. CIVIL CASE NO: 06-C-459

SAMUEL J. BRACKEN, JR., M.D.,

Defendant.

Certification Order

On a previous day, came the parties, by counsel, pursuant to Defendant's Renewed Motion for Summary Judgment. After denying the Defendant's Motion, and following oral arguments of counsel, the Court, *sua sponte*, certifies to the Supreme Court of Appeals of West Virginia, the following questions.

Questions of Law

1. Does a cause of action for medial negligence "accrue", for the purposes of the West Virginia borrowing statute, W.Va. Code §55-2A-2, in the State of West Virginia or the state of Ohio where the Defendant doctor is a West Virginia doctor, where the plaintiff is a West Virginia resident, where the doctor-patient relationship between the plaintiff-patient and defendant-doctor is established in the state of West Virginia, where the Defendant-doctor performs a tubal ligation in the state of Ohio, with no immediate injury, where the defendant-doctor chose the location for the tubal ligation procedure, where the tubal ligation is the only procedure which occurred in the state of Ohio in the course of the patient-doctor relationship between plaintiff and defendant, and where the plaintiff-patient suffers a sigmoid colon rupture in the State of West Virginia in the week following the tubal ligation procedure?

2. Does the West Virginia Borrowing statute, W.Va. Code §55-2A-2 apply to a medical negligence claim where the Defendant, a West Virginia physician, admits that both the substantive and procedural law of the state of West Virginia applies to the plaintiff's claim?

3. As a matter of public policy, should the West Virginia borrowing statute be construed so as not to bar a claim for medical negligence by a West Virginia

resident patient, where the defendant doctor is a West Virginia doctor, where the Plaintiff is a West Virginia resident, where the doctor-patient relationship between the plaintiff-patient and defendant-doctor is established in the State of West Virginia, where the defendant-doctor performs a tubal ligation in the state of Ohio with no immediate injury, where the defendant-doctor chose the location for the tubal ligation procedure, where the tubal ligation is the only procedure which occurred in the state of Ohio in the course of the patient-doctor relationship between Plaintiff and Defendant, and where the Plaintiff-patient suffers a sigmoid colon rupture in the state of West Virginia in the week following the tubal ligation procedure?

Relevant Undisputed Facts

Plaintiffs initiated this matter by serving on Samuel J. Bracken, Jr., M.D., a Notice of Claim dated October 27, 2006, and a Screening Certificate of Metit authored by Melvyn J. Ravitz, M.D., P.A., dated August 23, 2006. On or about December 14, 2006, Plaintiffs filed a Complaint in the Circuit Court of Ohio County, West Virginia, on Dr. Bracken alleging medical negligence. It is alleged by the Plaintiffs that Dr. Bracken negligently performed a laparoscopic sterilization on Jill Willey at East Ohio Regional Hospital in Martins Ferry, Ohio, on December 15, 2004. Then, on December 20, 2004, the Plaintiff was taken to surgery at Ohio Valley Medical Center by Dr. Howard Shackelford, Jr., who found a perforation of Mrs. Willey's sigmoid colon in the area that the tubal ligation had been performed.

On April 16, 2009, the deposition of Melvyn J. Ravitz, M.D., Plaintiffs' standard of care expert, was taken. Dr. Ravitz testified that his only criticism of Dr. Bracken involved his use of "blunt dissection and/or the use of cautery" with inadequate visualization, which "[r]esulted in some sort of insult that led to a delayed perforation" that was found on December 20, 2004.

On May 18, 2009, Dr. Bracken submitted his Revised Motion for Summary Judgment. In this Motion, Dr. Bracken argued that based on an application of West

Virginia's Borrowing Statute, W.Va. Code §55-2A-2, Plaintiff's claims are barred by the applicable statute of limitation. Particularly, Defendant argues that the claim accrued in Ohio, where Mrs. Willey underwent the sterilization procedure or where the tort occurred.

On June 26, 2009, a hearing was held on the Defendant's Revised Motion for Summary Judgment and, although Defendant's Motion was denied, this Court agreed to allow certified questions to be submitted to the Supreme Court of Appeals of West Virginia. This Court held that the West Virginia Borrowing Statute, W.Va. Code §55-2A-2, does not bar the Plaintiff's claims for medical negligence pursuant to the Ohio one-year statute of limitations as "the Plaintiff's cause of action did not accrue per the statute in the State of Ohio." Rather, this Court found that the Plaintiff's cause of action for medical negligence accrued in the state of West Virginia, "where the injury occurred."

West Virginia Code §51-1A-4

The Court and the parties acknowledge that the Supreme Court of Appeals of West Virginia may reformulate the certified questions.

Counsel

The Plaintiffs are represented by David A. Jividen, Esq., and Chad C. Groome, Esq., of Jividen Law Offices, P.L.L.S., 729 North Main Street, Wheeling, WV 26003. The Defendant is represented by David S. Givens, Esq., and Phillip T. Glyptis, Esq, Esq., of Flaherty, Sensabaugh & Bonasso, P.L.L.C., 1225 Market Street, P.O. Box 6545, Wheeling, WV 26003.

IT IS SO ORDERED.

Objections and exceptions of the parties are saved.

This Clerk shall transmit a copy of this Order to all Counsel of record and the Supreme Court of Appeals of West Virginia.

ENTERED this 22 day of September 2009.

MARTIN J. GAUGHAN, JUDGE
First Judicial Circuit

A copy, Teste:

Circuit Clerk